**Rule 3, Ariz. R. Crim. P.**

**"*Terry* stop and frisk"— *Illinois v. Wardlow:* Unprovoked flight from law enforcement officer is an appropriate factor in weighing the "reasonable, articulable suspicion" of criminal activity justifying a *Terry* stop……..**
**……...Revised 2/2010**

An arrest must be based upon probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981); *see State v. Houlf*, 27 Ariz. App. 633, 636, 557 P.2d 565, 568 (1976). However, not every stop of an individual requires probable cause. "To make an investigatory stop … the police need only have 'reasonable suspicion' that the suspect is engaged in criminal activity." *State v. Weinstein,* 190 Ariz. 306, 310, 947 P.2d 880, 884 (App. 1997), *citing Terry v. Ohio*, 392 U.S. 1 (1968); *accord State v. Rogers*, 186 Ariz. 508, 924 P.2d 1027 (1996).

> The Fourth Amendment does not prohibit, nor is it always invoked in, every personal encounter between the police (or state officials) and citizens. In this regard, an individual is seized for the purposes of the Fourth Amendment when an officer stops him and restrains his freedom to walk away.

*State v. Serna,* 176 Ariz. 267, 272, 860 P.2d 1320, 1325 (App. 1993) [citations and internal quotation marks omitted].

In *Terry*, the United States Supreme Court articulated the distinction between an arrest and an investigatory "stop and frisk." The Court held that an officer may stop an individual based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. at 21. Subjective good faith is not enough; the facts must be considered on an objective basis. The question is, "would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id*. at 21-22 [internal quotation marks omitted]. "If an officer has a

reasonable suspicion, based upon specific and articulable facts, that a suspect is involved or wanted in connection with a crime, then a brief stop to investigate that suspicion in fact may be the best and most sensible response." *State v. Romero*, 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. 1993), *citing Terry*, 392 U.S. at 21-24.

In *Illinois v. Wardlow*, 528 U.S. 119 (2000), the United States Supreme Court held that unprovoked flight from law enforcement officers is a permissible factor in determining whether officers have "reasonable, articulable suspicion" justifying a *Terry* stop. In *Wardlow*, officers in a caravan of four marked police cars entered an area known for heavy narcotics trafficking in order to investigate drug transactions. *Id*. at 124. Wardlow was standing outside holding an opaque bag when the caravan passed; he looked in their direction and immediately fled. The officers pursued Wardlow and performed a *Terry* stop and frisk for weapons, including a squeeze of the bag. The bag contained a handgun and ammunition, and the police arrested Wardlow for a weapons offense.

The Illinois courts held that Wardlow's gun should have been suppressed because the officer lacked sufficient reasonable suspicion to justify the officers in making a *Terry* stop. The Illinois courts relied on *Florida v. Royer*, 460 U.S. 491 (1983). *Royer* held that although police have the right to approach individuals and ask them questions, the individuals may ignore the police and go on their way. *Id.* at 497-498. Refusal to respond to police questioning, without more, does not provide a legitimate basis for an investigatory stop. *Id.*

The United States Supreme Court reversed, noting that the officers in *Wardlow* were entering an area known for heavy narcotics trafficking and expected to encounter

a large number of people in the area, including drug customers and lookouts. While mere presence in a high crime area, standing alone, is insufficient to provide the reasonable, particularized suspicion necessary for an investigatory stop under *Terry*, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Id*. at 124. The Court noted that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion," and "the determination of reasonable suspicion must be based on common sense judgments and inferences about human behavior." *Id*.

The *Wardlow* Court recognized that under *Florida v. Bostick*, 501 U.S. 429, 437, (1991), mere refusal to cooperate with police is insufficient to justify a stop, but distinguished unprovoked flight from officers from refusal to answer questions:

> [U]nprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

*Wardlow*, 528 U.S. at 125.

The Court recognized that flight is not necessarily a sign of ongoing criminal activity and that people may flee for innocent reasons. However, police may nonetheless make *Terry* stops of fleeing individuals "to resolve the ambiguity"**:**

> In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed

> to go on his way. But in this case the officers found respondent in possession of a handgun, and arrested him for violation of an Illinois firearms statute.

*Id*. at 126.

The Arizona Court of Appeals followed *Wardlow* in *State v. Guillory*, 199 Ariz. 462, 466, 18 P.3d 1261,1265 (App. 2001). In *Guillory*, police in an unmarked police car were patrolling an area with high drug and prostitution activity. They saw Guillory drive a car with a female passenger into the parking lot of a motel the officers knew had a reputation for narcotics and prostitution activity. After observing Guillory further, the officers asked a uniformed officer in a marked car to interview Guillory. The officer approached Guillory, made eye contact with him, and waved at him. Guillory began to run. The uniformed officer drove after Guillory and saw him toss a tissue from his pocket. The officer stopped Guillory and handcuffed him, then retrieved the tissue, finding cocaine. Guillory argued that the cocaine should be suppressed because the officer stopped him without probable cause. The Court disagreed, noting that the officer did not use any physical force, nor did Guillory submit to the officer's assertion of authority. Instead, the officer merely invited a consensual response. *Guillory*, 199 Ariz. at 465, ¶ 11, 18 P.3d at 1264, *citing California v. Hodari D.*, 499 U.S. 621 (1991). Likening Guillory's unprovoked flight to the facts of *Wardlow*, the Court found no unlawful seizure. The unprovoked flight, coupled with the other circumstances, provided sufficient reasonable suspicion to justify a *Terry* stop. *Guillor*y, 199 Ariz. at 466, ¶ 13, 18 P.3d at 1265.